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Comment

EMPLOYMENT DISCRIMINATION IN THE ARMED SERVICES— AN ANALYSIS OF RECENT DECISIONS AFFECTING SEXUAL PREFERENCE DISCRIMINATION IN THE MILITARY

I. INTRODUCTION

Probably in no area of employment has the homosexual individual¹ been more rigidly, consistently, and harshly discriminated against than in the United States Armed Forces.² The invariable service response to homosexuality is immediate discharge.³ Despite the fact that "homosexuality per se has no relationship to ability to perform good military

1. The homosexual individual is difficult to define because "homosexuality—heterosexuality is not necessarily an either—or proposition. . . . [N]early half of American males [fall] somewhere between 'exclusively heterosexual' . . . and 'exclusively homosexual'." A. BELL & M. WEINBERG, *HOMOSEXUALITIES* 53 (1978). For a further explanation of what has been called the "heterosexual—homosexual continuum," see *id.* at 53-61; W. CHURCHILL, *HOMOSEXUAL BEHAVIOR AMONG MALES* 36-59 (1971); F. KLEIN, *THE BISEXUAL OPTION* 13-19 (1978).

The armed forces' regulations make no such fine distinctions. See note 3 *infra*. In this comment the term "homosexual" will be used to mean one who comes under the armed forces' regulations.

2. See Note, *Homosexuals in the Military*, 37 *FORDHAM L. REV.* 465, 476 (1969). One commentator has noted that, "[v]iewed in the context of the historical development of the military regulations affecting homosexuals, current treatment is harsh." *Id.* See also Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 *HASTINGS L.J.* 799, 837 (1979).

3. See, e.g., Air Force Regulation 39-12, § H, ¶ 2-103 (1972) [hereinafter cited as *A.F.R.*]. This typical regulation for many years stated in pertinent part:

a. Homosexuality is not tolerated in the Air Force. Participation in a homosexual act, or proposing or attempting to do so, is considered serious misbehavior regardless of whether the role of a person in a particular act was active or passive. Similarly, airmen who have homosexual tendencies, or who associate habitually with persons known to them to be homosexuals, do not meet Air Force standards. Members of the Air Force serving in the active military service represent the military establishment 24 hours a day. There is no distinction between duty time and off-duty time as the high moral standards of the service must be maintained at all times.

b. It is the general policy to discharge members of the Air Force who fall within the purview of this section. Exceptions to permit retention may be authorized only where the most unusual circumstances exist and provided the airman's ability to perform military service has not been compromised.

Id. This language remained in force until 1981, when new regulations seeking to maintain the same policy were issued. See notes 58 & 66 *infra*.

service,"⁴ homosexuality has been consistently classified by the services as *per se* disruptive behavior.⁵ Although the majority of the medical and psychological community has long since abandoned this view,⁶ and despite the fact that homosexuality is no longer a legally acceptable reason for discharge of an employee in the civilian sector,⁷ it is estimated that between 2,000 and 3,000 individuals each year are discharged from the armed forces in cases involving homosexuality.⁸ Presumably these figures would be even higher except for the fact that most homosexual individuals in the armed services "remain undiscovered and complete their service with honor."⁹

In recent years, homosexual servicemembers have challenged the military's policy of automatic discharge for non-standard sexual preferences as violative of the Constitution.¹⁰ This trend paralleled the "gay rights" movement which gained strength in civilian society in the late 1960's.¹¹ This movement was characterized, in part, by an increased willingness on the part of homosexuals to turn to the courts to protect

4. Note, *supra* note 2, at 473, citing Everhard, *Problems Involving the Disposition of Homosexuals in the Service*, 2 JAG. BULL. No. 6 at 20, 21 (1960). For a summary of the statistical evidence confirming this statement, see C. WILLIAMS & M. WEINBERG, *HOMOSEXUALS AND THE MILITARY* 60 (1971).

5. See, e.g., A.F.R. 36-2, ¶ 3(c)(1) (1977). This regulation states in pertinent part:

Homosexuality is not tolerated in the Air Force. Participation in a homosexual act, or proposing or attempting to do so, is considered serious misbehavior regardless of whether the role of a person in a particular act was active or passive. Similarly, officers who have homosexual tendencies, or who associate habitually with persons known to them to be homosexuals, do not meet Air Force standards.

Id. Similarly, A.F.R. 39-12 classifies homosexuality with such disruptive behaviors as alcohol abuse, drug abuse, and financial irresponsibility. A.F.R. 39-12, §§ I, ¶ 2-106, A, ¶ 2-4(c) (1972).

6. For a survey of 18 studies (including a study of men in the military) which leads inescapably to this conclusion, see A. BELL & M. WEINBERG, *supra* note 1, at 195-97.

One commentator has concluded that it is now "obvious that the freedom of intimate association extends to homosexual associations as it does to heterosexual ones." Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 682 (1980). Another commentator, after an extensive survey of the scientific evidence, concluded that "[t]he myth that homosexuality carries with it an innate inability to perform fully in society is now quite thoroughly discredited." L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 944 n.17 (1978).

7. See 8 LAB. REL. REP. (BNA) ¶ 421:620. See also the Civil Service Commission's revised suitability guidelines, at note 13 *infra*.

8. See C. WILLIAMS & M. WEINBERG, *supra* note 4, at 45-53.

9. *Id.* at 60. Studies have indicated that 75% to 80% of all homosexual servicemembers successfully complete their terms of service. *Id.*

10. For a concise history of this trend see generally Rivera, *supra* note 2, at 837-55. *Recent Developments in Sexual Preference Law*, 30 DRAKE L. REV. 311 (1980).

11. See generally E. BOGGAN, M. HAFT, C. LISTER & J. RUPP, *THE RIGHTS OF GAY PEOPLE* 5-6 (1975) [hereinafter cited as E. BOGGAN].

and establish rights in the area of employment.¹² One result of this action was the promulgation by the Civil Service Commission (CSC) of federal guidelines which proscribe discrimination based upon sexual preference in federal public (civilian) employment.¹³

Sociological data indicate that approximately thirty percent of servicemembers can be classified as "homosexuals" under the armed forces regulations.¹⁴ This fact, coupled with the armed forces' manifest intent to continue discrimination on the basis of sexual preference,¹⁵ indicates an inevitable increase in the volume and intensity of legal confrontation, potentially hindering the effectiveness of the armed services.¹⁶ Sexual preference discrimination in the military is therefore

12. See generally Rivera, *supra* note 2, at 338.

13. The new guidelines provide "for applying the same standard in evaluating sexual conduct, whether heterosexual or homosexual." Levine, *Legal Rights of Homosexuals in Public Employment*, 1978 ANN. SURVEY AM. L. 455, 484 (1979) (emphasis in original). The revised suitability guidelines include the following:

Court decisions require that persons not be disqualified from Federal employment solely on the basis of homosexual conduct. The Commission and agencies have been enjoined not to find a person unsuitable for Federal employment solely because that person is a homosexual or has engaged in homosexual acts. Based upon these court decisions and [an] outstanding injunction, while a person may not be found unsuitable based on unsubstantiated conclusions concerning possible embarrassment to the Federal service, a person may be dismissed or found unsuitable for Federal employment where the evidence establishes that such person's sexual conduct affects job fitness.

Id. at 484 n.231 (emphasis added), quoting Fed. Personnel Manual Supp. 731-1, subch. 53-26(3)c.

14. C. WILLIAMS & M. WEINBERG, *supra* note 4, at 58. This figure represents the incidence of homosexual behavior among males in the armed forces, which were overwhelmingly male at the time the study was made. *Id.* Comparable figures for females in the armed forces do not seem to exist. Studies indicate, however, that the incidence of homosexual activity in the female population generally is 28%. A. KINSEY, W. POMEROY, C. MARTIN, & P. GEBHARD, *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* 452-54 (1953).

15. The services have litigated all known cases in which discharge has been resisted by the homosexual servicemember, and have appealed adverse rulings. See generally Rivera, *supra* note 2, at 841-55. In reviewing its policy in response to adverse court rulings, the Defense Department has remained uncompromising. Air Force Times, Feb. 2, 1981, at 4, col. 2.

16. The armed services do not have an active program to seek out and discharge homosexuals; the discharges only occur when a servicemember's homosexuality comes to the official attention of the service. *Matlovich v. Secretary of the Air Force*, 591 F.2d 852, 856 n.9 (D.C. Cir. 1978). If a substantial number of homosexual servicemembers assert their right to a particular sexual preference, and the services rigidly adhere to their discharge policy, the armed services could be seriously weakened. For example, assume that the 30% approximation of homosexuals in the armed services is accurate. See text accompanying note 14 *supra*; C. WILLIAMS & M. WEINBERG, *supra* note 4, at 58. If only one third of this group contemporaneously proclaimed their sexual preference, then armed forces strength could be reduced by 10% until those discharged could be replaced with properly trained personnel—a

an area of vital importance for those concerned with the national defense, as well as those concerned with individual rights.

This comment will examine three cases decided in 1980 which suggest that the armed services will no longer be permitted to classify homosexuality as *per se* disruptive behavior when discharging non-disruptive homosexual servicemembers.¹⁷ This comment will review the recent history of the evolution of gay rights in the military and will seek to analyze the decisions which purport to give guidance in this important area.

II. BACKGROUND

In 1949, the Department of Defense (D.O.D.) instituted its policy that "known homosexual individuals were military liabilities and security risks who must be eliminated."¹⁸ Violations of this policy are punishable under Article 125 of the Uniform Code of Military Justice (U.C.M.J.) which prohibits sodomy.¹⁹ This basic policy was reaffirmed by the D.O.D. in 1975,²⁰ and is parroted by the regulations of the Army,

process which, for example, in the case of a fighter pilot, could take over 18 months.

17. See *Matlovich v. Secretary of the Air Force*, 23 F.E.P. Cases 1251 (D.D.C. 1980); *Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980); *benShalom v. Secretary of the Army*, 489 F. Supp. 964 (E.D. Wis. 1980).

18. See Note, *supra* note 2, at 468. This was apparently a retreat from an earlier liberalization of Army policy toward homosexuals in the post-war years. *Id.* at 466-68. It has been suggested that the new, more repressive policy, was a reaction to the United States Senate investigation of homosexuals in the government. *Id.* at 468 n.31.

19. 10 U.S.C. § 925 (1976). Article 125 is neutral as to sexual preference, and may be used to prosecute homosexuals or heterosexuals of either sex for many forms of non-standard sexual conduct. See *id.*; *United States v. Harris*, 8 M.J. 52 (C.M.A. 1979) (prosecution of soldier for engaging in consensual cunnilingus with girlfriend). Violation of Article 125 is punishable by five years at hard labor, dishonorable discharge, and total forfeiture of all pay and allowances. 10 U.S.C. § 856 (1976); U.S. DEP'T OF DEFENSE, MANUAL FOR COURTS-MARTIAL, UNITED STATES 25-14 (rev. ed. 1969) [hereinafter cited as M.C.M.].

20. In a policy directive on homosexuals in the armed forces, the D.O.D. stated that:

Department of Defense policy requires prompt separation of homosexuals. The homosexual person is considered unsuitable for military service and is not permitted to serve in the Armed Forces in any capacity. His presence in a military unit would seriously impair discipline, good order, morale, and security. Further, the Department of Defense has an obligation and responsibility to provide our young men and women in the Armed Forces with the most wholesome and healthful environment possible.

Those individuals who have established homosexual tendencies are discharged administratively as unsuitable for military service. Persons discharged under this purview receive either an honorable or general discharge depending on the quality of their previous military service. Those persons who commit homosexual acts or acts of sexual perversion, when established, may be discharged as unfit for military

Navy and Air Force.²¹

Despite the availability of court-martial jurisdiction,²² the services have relied almost exclusively on administrative discharge procedures when discharging homosexual individuals from the service.²³ The regulations of the three services concerning discharge have traditionally been broader, allowing discharge actions to be initiated not only for homosexual acts, but also for "homosexual tendencies, desire, or interest, even if without overt homosexual acts."²⁴ However, administrative discharges are subject to judicial review in the federal district courts or the Court of Claims.²⁵

Until the mid-1970's, most persons who challenged their discharge from the services under these regulations did not voluntarily admit their

service and may receive an undesirable discharge. In addition, specific homosexual acts may be a violation of the Uniform Code of Military Justice and, in many cases, the laws of various states.

The unique character of the military environment, both ashore and at sea, precludes any possibility of their assimilation within a military organization, under any conditions. Consequently, homosexual persons cannot be accepted into our Armed Forces and must be promptly separated when so identified. Likewise, persons who are found unsuitable for military service because of homosexual or other aberrant tendencies are not accepted into or are discharged from military service, as appropriate.

This policy is considered to be absolutely essential to the effectiveness of our Armed Forces and to the morale and welfare of its members.

Department of Defense Policy Directive (1975).

21. A typical service regulation states that "[m]embers involved in homosexuality are military liabilities who cannot be tolerated in a military organization. . . . Their prompt separation is essential." SEC. NAV. INST. 1900.9A. See also note 3 *supra*.

22. M.C.M. chs. IV & XXVIII; 10 U.S.C. §§ 802-803 (1976). All members of the armed forces are subject to the U.C.M.J. and may be tried by court-martial for any offense made punishable by the code. See *id.*

23. The administrative discharge procedure is speedier and procedurally simpler than the trial-like court-martial. See Everett, *Military Administrative Discharges—The Pendulum Swings*, 1966 DUKE L.J. 41, 96; Rivera, *supra* note 2, at 838. Generally, it seems that courts-martial are selected in sexual preference cases only where there is also an allegation of a serious crime, such as rape. See, e.g., *United States v. Coronado*, 11 M.J. 522 (A.F.C.M.R. 1981) (Air Force Captain accused of homosexual rape of soldier).

24. *benShalom v. Secretary of the Army*, 489 F. Supp. 964, 969 (E.D. Wis. 1980), quoting Army Regulation 135-178, Chapter 7-5(b)(6). Compare *id.* with *A.F.R.* 39-12, *supra* note 3.

For an overview of general military discharge procedure, see *Matlovich v. Secretary of the Air Force*, 591 F.2d 852, 858 (D.C. Cir. 1978). For a different perspective, see E. BOGGAN, *supra* note 11, at 43-60.

25. Rivera, *supra* note 2, at 841. Review is usually sought on the basis of substantive constitutional grounds, such as: the impropriety of certain treatment based on a person's status; the protection of consensual adult acts by the right of privacy; the requirement of a "rational nexus" between behavior and the reasons for discharge, and the first amendment right of association. *Id.* at 841-42.

homosexuality, but instead premised their challenges on procedural due process grounds.²⁶ Since 1973, however, direct attacks by admitted homosexuals on the constitutionality of the services' regulations and policies have become more frequent.²⁷

In *Doe v. Chaffee*,²⁸ a seaman voluntarily disclosed to naval authorities that he was involved in a homosexual relationship with a shipmate.²⁹ The seaman was assured that, because of his excellent record, he would receive a general discharge; however, the Navy gave him an undesirable discharge.³⁰ He then petitioned the Board for Correction of Naval Records for correction of his discharge, but was frustrated by administrative delays in the process of application.³¹ The seaman then petitioned for a writ of mandamus to set aside the undesirable discharge and for "correction . . . of his discharge to either an honorable or general discharge."³² Although the court dismissed the action, it held that an undesirable discharge for homosexual acts could be set aside as arbitrary and capricious, unless the service officials could demonstrate a nexus between an individual's homosexual activity and the quality of his military service.³³

Attacks on the services' regulations since *Chaffee* have become more pointed, questioning not the type of discharge granted, but rather, the very ability of the armed services to discharge individuals on the basis of non-disruptive homosexual activities.³⁴ Prior to 1980, many questions

26. Rivera, *supra* note 2, at 841. See *Clackum v. United States*, 296 F.2d 226 (Ct. Cl. 1961) (Air Force discharge of enlisted woman for homosexuality invalid where she received no pre-discharge hearing, was not informed of specific charge against her, and all evidence submitted at hearing was favorable to her).

27. Rivera, *supra* note 2, at 837-55.

28. 355 F. Supp. 112 (N.D. Cal. 1973).

29. *Id.* at 113.

30. *Id.*

31. *Id.*

32. *Id.* at 114. During the litigation, the Navy, pursuant to a previous application by plaintiff, upgraded plaintiff's discharge to a general discharge, whereupon plaintiff asked the court for an honorable discharge. *Id.*

33. *Id.* The court then proceeded to find a nexus in petitioner's own disclosure statement which became a part of his military record. *Id.* at 115. In his statement, petitioner revealed that the problem and tensions caused by his relationship with his shipmate "had made and would continue to make the performance of his official duties difficult if not impossible." *Id.*

34. See *Champagne v. Schlesinger*, 506 F.2d 979 (7th Cir. 1974). In this case, two seaman apprentices were discharged for allegedly engaging in consensual homosexual activity while off duty at their off base apartment. *Id.* at 980-81. Plaintiffs sought not to upgrade their discharges, but to have their discharges set aside on the grounds that the Navy policy, "as it relates to private consensual homosexual conduct between adults is void . . . because it is in violation of the . . . constitution." *Id.* The court did not reach the

about the services' discriminatory regulations and policies had been raised, but the case law had provided few answers. The policies of all three services have since been subjected to rigorous examination, culminating in three decisions of major importance in 1980.³⁵

The first of these decisions was rendered by the United States District Court for the Eastern District of Wisconsin in *benShalom v. Secretary of the Army*.³⁶ In *benShalom*, the plaintiff challenged the constitutionality of the "status" section of the Army's homosexual regulations.³⁷ This section mandated the discharge of any soldier who considered himself a homosexual, even though that person engaged in no homosexual acts whatever.³⁸ The *benShalom* court framed the issue as "whether petitioner can be discharged from the Army (even if the discharge is 'honorable') simply because she is a homosexual, although there is no showing that her sexual preferences interfered with her abilities as a soldier or adversely affected other members of the Service."³⁹ The court held that petitioner could not be so discharged, and found the Army regulations unconstitutional on three grounds: 1) they infringed on Ms. benShalom's first amendment rights as well as chilling all soldiers' first amendment liberties;⁴⁰ 2) they violated Ms.

constitutional issue, however, vacating and remanding on the ground that the plaintiffs failed to exhaust their administrative remedies.

Consideration of the constitutionality of the services' discriminatory policies has been thwarted by the court's order to remand for exhaustion of administrative remedies in numerous cases. See, e.g., *Von Hoffburg v. Alexander*, 615 F.2d 633 (5th Cir. 1980) (petition for declaratory and injunctive relief to enjoin the Army from permanently discharging plaintiff held in abeyance until honorably discharged servicemember exhausts administrative remedies); *Heisel v. Chalbeck*, 405 F. Supp. 361 (M.D. Fla. 1976) (petition for injunction to prevent involuntary discharge denied, pending exhaustion of postdischarge administrative remedies).

35. See *benShalom v. Secretary of the Army*, 489 F. Supp. 964 (E.D. Wis. 1980) (Army regulations found unconstitutional); *Matlovich v. Secretary of the Air Force*, 23 F.E.P. Cases 1251 (D.D.C. 1980) (Air Force unable to justify its regulations concerning homosexuality); *Saal v. Middendorf*, 427 F. Supp. 192 (N.D. Cal. 1977) (Navy regulations and policy arbitrary and capricious as applied to plaintiff), *rev'd sub nom. Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980). For a discussion of *benShalom*, see notes 36-42 and accompanying text *infra*. For a discussion of *Matlovich*, see notes 43-58 and accompanying text *infra*. For a discussion of *Saal* (*Beller*), see notes 59-65 and accompanying text *infra*.

36. 489 F. Supp. 964 (E.D. Wis. 1980).

37. *Id.* at 967. Ms. benShalom was a reservist instructor at the Fourth Brigade Drill Sergeant Academy. *Id.* at 969. At various times during her training she acknowledged that she was a homosexual, but there was no indication that she had engaged in homosexual acts or had ever made a homosexual advance toward female reservists. *Id.*

38. See note 24 and accompanying text *supra*.

39. 489 F. Supp. at 969.

40. *Id.* at 973-74. Tracking the language of the regulation, the court said it could "see no detrimental effect on any legitimate military interest caused

benShalom's privacy rights under the first, fourth, fifth, and ninth amendments by infringing on her "right to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as one's personality, self-image, and indeed, one's very identity";⁴¹ and 3) they abridged her rights to substantive due process under the fifth amendment by allowing her to be discharged as "unsuitable" when, despite her homosexuality, she was suitable for military service in every other respect.⁴²

In *Matlovich v. Secretary of the Air Force*,⁴³ the court considered an Air Force regulation mandating discharge for homosexual acts.⁴⁴ The petitioner, Technical Sergeant Matlovich, a homosexual,⁴⁵ attempted to

by a soldier who merely 'evidences' a 'tendency, desire or interest' in most anything, including homosexuality." *Id.* at 974. Therefore, in balancing Ms. benShalom's first amendment rights against the needs of the military, the court concluded that "First Amendment interests carry the day. . . ." *Id.* at 975. For an analysis of the *benShalom* court's method of balancing individual rights against the needs of the military, see notes 80-83 and accompanying text *infra*.

41. 489 F. Supp. at 975, citing *Carey v. Population Services Int'l*, 431 U.S. 678, 684 (1977); *Roe v. Wade*, 410 U.S. 113, 152 (1973). The court said, "[t]he privacy of the integral components of one's personality—the essence of one's identity—this court believes, is an interest so fundamental or 'implicit in the concept of ordered liberty' as to merit constitutional protection." 489 F. Supp. at 975, quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

42. 489 F. Supp. at 977. The court noted that, despite her homosexuality, plaintiff's extensive service record indicated that her performance was not only suitable, but exemplary. *Id.* Therefore, the court concluded it was arbitrary and capricious to conclude that she was other than a "suitable" soldier. *Id.*

43. 13 E.P.D. ¶ 11,325, *rev'd and remanded*, 591 F.2d 852 (D.C. Cir. 1978), *on remand*, 23 F.E.P. Cases 1251 (D.D.C. 1980).

44. 13 E.P.D. ¶ 11,325, at 6088.

45. 591 F.2d at 853. Matlovich submitted a letter to the Secretary of the Air Force in which he declared he was a homosexual, and asked that an exception be made to the usual policy of discharging homosexuals. *Id.* On appeal, the court noted that prior to sending the letter, Matlovich had had a most

commendable highly useful service in the military over a long period of time, starting with the Air Force in 1963. . . . Here is a man who volunteered for assignment to Viet Nam, who served in Viet Nam with distinction, who was awarded the *Bronze Star* while only an Airman First Class, engaged in hazardous duty on a volunteer basis on more than one occasion, wounded in a mine explosion, re-volunteered, has excelled in the Service as a training officer, as a counseling officer . . . and has at all times been rated at the highest possible ratings by his superiors in all aspects of his performance, receiving in addition to the *Bronze Star*, the *Purple Heart*, two *Air Force Commendation Medals* and a *Meritorious Service Medal*.

Id. The letter initiated an investigation followed by involuntary administrative discharge proceedings, resulting in Matlovich's discharge from the Air Force on October 22, 1975. *Id.* at 854.

have the sections of the Air Force regulations mandating discharge for homosexual acts declared unconstitutional on privacy and equal protection grounds.⁴⁶ The initial trial court decision rejected the constitutional arguments on the basis of cases which the trial court interpreted as holding that there existed no fundamental right to engage in homosexual activity.⁴⁷ The trial court therefore narrowed the issue to whether the honorable discharge of Sergeant Matlovich was arbitrary and capricious⁴⁸ and applied the deferential rational relationship test to the regulation.⁴⁹ The trial court concluded that the Air Force had a legitimate interest in assuring full readiness for combat, protection of recruitment, security of military information, and overall efficiency, and therefore, the Air Force regulation at issue was not so irrational that it could be branded arbitrary and capricious.⁵⁰ Therefore, the district court "reluctantly" granted summary judgment in favor of the Air Force.⁵¹

On appeal, the United States Court of Appeals for the District of Columbia vacated the district court decision.⁵² However, the court of appeals did not reach the constitutional issue.⁵³ The court noted that the Air Force regulations specifically provided for the retention of

46. 13 E.P.D. ¶ 11,325, at 6088.

47. *Id.* The district court relied primarily on two cases, *Doe v. Commonwealth's Attorney*, 425 U.S. 901 (1976), and *Singer v. United States Civil Serv. Comm'n*, 530 F.2d 247 (9th Cir. 1976), *rev'd* 429 U.S. 1034 (1977). 13 E.P.D. ¶ 11,325 at 6088. However, the year after the trial court's decision, the Supreme Court decided *Carey v. Population Services Int'l*, 431 U.S. 678 (1977), casting significant doubt on this interpretation of *Doe v. Commonwealth's Attorney*. See note 53 *infra*. Similarly, *Singer* was later reversed. See 429 U.S. 1034 (1977).

48. 13 E.P.D. ¶ 11,325, at 6089.

49. *Id.* The trial court noted that due process required the plaintiff to show that there was no rational relationship between the regulations dictating dismissal, and any legitimate state interest. *Id.* The court opined that judicial scrutiny in cases involving the Armed Forces was especially narrow since the appellate court required "undue deference to the judgments of the military." *Id.* The court therefore felt obliged to accept and apply this narrower standard of review. *Id.*

50. *Id.*

51. *Id.* The trial court felt that the Air Force position in this case was a "knee jerk" reaction based on outdated sexual stereotypes. *Id.* Although the trial court concluded that the Air Force regulations were sufficient to withstand legal attack, it found the result "distressing," an example of a "bad case" making "bad law." *Id.* The trial court's comments are cited at length in note 137 *infra*.

52. 591 F.2d at 855.

53. *Id.* The government argued that the question of whether private homosexual acts between consenting adults was constitutionally protected was answered in the negative by the Supreme Court in *Doe v. Commonwealth's Attorney*, 425 U.S. 901 (1976). 591 F.2d at 855. The court noted however, that the Supreme Court had later said that the issue was still open. *Id.*, citing *Carey v. Population Services Int'l*, 431 U.S. 678, 688 n.5, 694 n.17 (1977).

homosexuals "in the most unusual circumstances," and that the Air Force had in the past retained homosexual members on active duty.⁵⁴ The court was disturbed because it found it "impossible to tell on what grounds the Air Force refused to make an exception or how it distinguished this case from ones in which homosexuals" were retained.⁵⁵ The court therefore vacated and remanded the case to allow the Air Force to explain why it refused to retain Sergeant Matlovich on active duty.⁵⁶

On remand, the district court found that the Air Force was "totally unable in any way to clarify or explicate its position on discharge and retention of homosexuals either generally or as applicable to Plaintiff Matlovich."⁵⁷ The court further found that because there was in fact no satisfactory standard in existence, the discharge of Matlovich was unlawful.⁵⁸

54. 591 F.2d at 853 n.1. See A.F.R. 39-12, § H, ¶ 2-103 b; note 3 *supra*.

55. 591 F.2d at 855.

56. *Id.* at 857. The court required that the Air Force provide an indication of the grounds for its exercise of discretion "so that the court [could] decide if it was arbitrary, capricious, or unlawful in exercising its discretion whether or not to retain Matlovich." *Id.*

57. 23 F.E.P. Cases at 1252. The court, in a blistering opinion, charged "that the Air Force, either through a total breakdown in its own communications or by an intentional trifling with the legal process, has misled two courts and confused the issues in this long, drawn-out case." *Id.* at 1251.

58. *Id.* at 1252. The court declared plaintiff's discharge void *ab initio*, ordered his immediate reinstatement with full back pay and seniority, and ordered that a copy of the court's order be included in his personnel records. *Id.*

In response to this adverse decision, the Department of Defense promulgated new temporary regulations designed to close the gap that the services perceived the *Matlovich* case had opened. D.O.D. Directive 1332.14, 46 Fed. Reg. 9571 (1981) (to be codified in 32 C.F.R. Part 41). The prefatory comments to the new regulations admitted that "various court decisions raised questions with respect to separation of servicemembers on the basis of homosexuality." *Id.* The comments explained why the D.O.D. rushed the new regulations into print: "because of the overriding importance of providing the Military Departments with clear guidance on this issue, it was determined that revision of those procedures relating to homosexuality should be promulgated without waiting for publication of the complete revision of the Directive." *Id.*

The thrust of the new regulations is to eliminate the broad discretionary language upon which the court focused in the *Matlovich* case, and to narrow the circumstances under which an individual who has engaged in homosexual acts may be retained in the service. *Id.* at 9577-78. Under the new regulations, such an individual may be retained only if a board of officers finds that:

- 1) such conduct is a departure from the member's usual behavior; and
- 2) such conduct is unlikely to recur; and
- 3) force, coercion, or intimidation was not involved in the conduct; and
- 4) the member's continued presence in the service is consistent with good order, discipline, and morale; and

The final significant decision of 1980 was rendered by the United States Court of Appeals for the Ninth Circuit in *Beller v. Middendorf*.⁵⁹ In *Beller*, an enlisted woman in the Navy with a fine performance record, was prevented from re-enlisting because of her admitted homosexual relationship with another enlisted woman.⁶⁰ She brought suit, contending she was deprived of due process of law by the Navy regulations which rendered her ineligible for re-enlistment.⁶¹

The trial court found that the Navy regulations, at least as applied to the plaintiff, were arbitrary and capricious and violative of her fifth amendment due process rights.⁶² The Ninth Circuit reversed, concluding that the "importance of the government interests furthered and . . . the relative impracticability . . . of achieving the Government's goals by regulations which turn more precisely on the facts of an individual case, outweigh whatever heightened solicitude is appropriate for consensual private homosexual conduct"—at least where the employer is the Navy.⁶³ Conceding that the rule was harsh, and perhaps irrational,⁶⁴ the court nevertheless felt that the peculiar needs of the

5) the member does not desire or intend to engage in homosexual acts in the future.

Id. at 9578. The basic purpose of the regulation was to reaffirm the D.O.D. policy "that homosexuality is incompatible with military service." *Id.* at 9571.

59. 632 F.2d 288 (9th Cir. 1980).

60. Saal v. Middendorf, 427 F. Supp. 192-94 (N.D. Cal. 1977), *rev'd sub nom.* Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980). Plaintiff, after admitting during an investigation that she had consensual homosexual relations with another enlisted woman, was processed for separation. 427 F. Supp. at 194. During this processing period, her enlistment expired, and she was given a re-enlistment code designating her ineligible for re-enlistment. *Id.* Even during this processing period, her performance continued to be outstanding as evidenced by her final *Evaluation of Performance* for the period 1 Mar.-31 Jul. 1975:

AIRMAN SAAL is in training on the Ground Control position and progressing well. She studies very well on her own and always prepares herself thoroughly for each step in training. Under close observation AIRMAN SAAL shows good judgment and foresight on Ground Control while maintaining composure. Quite well liked, AIRMAN SAAL always enhances the positive attitude her work group strives for. AIRMAN SAAL is always smartly dressed and presents a fine example of today's enlisted woman. Highly recommended for advancement and reenlistment.

Id. at 204. During her period of enlistment, Airman Saal had six other evaluations, all of the same positive tone. *Id.* at 203-04.

61. Saal v. Middendorf, 427 F. Supp. 192, 194 (N.D. Cal. 1977), *rev'd sub nom.* Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980).

62. Saal v. Middendorf, 427 F. Supp. 192, 194 (N.D. Cal. 1977), *rev'd sub nom.* Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980).

63. 632 F.2d at 812.

64. *Id.* at 808 n.20. The court, however, was unconcerned that the Navy policy "may be irrational as applied in particular cases," reasoning that "the general policy of discharging all homosexuals is rational." *Id.* at 812.

military, and the Navy in particular, made the rule constitutional in this case.⁶⁵

III. ANALYSIS

A. Discharge for Homosexual Status

Of the three cases decided in 1980, only the *benShalom* case squarely addressed the issue of discharge for homosexual status.⁶⁶ None of the *Matlovich* series of decisions addressed the "status" issue, since they were concerned primarily with discharge for homosexual acts.⁶⁷ Although the *Beller* case was also concerned with a discharge because of homosexual acts, the court appeared to accept as given the unconstitutionality of discharge based on sexual preference.⁶⁸

If the *benShalom* court has correctly stated the law, it would follow that at least some aspects of the services' sex-preference discharge policies can no longer be enforced. Those policies which mandate the discharge of persons merely because they might exhibit homosexual tendencies, desire, or interest⁶⁹ seem clearly unconstitutional under *benShalom*. Therefore, it is worthwhile to concentrate in detail upon the *benShalom* reasoning.

The *benShalom* court was inclined to give the military "the widest possible latitude" in the administration of personnel matters,"⁷⁰ but

65. *Id.* at 810-12. The court emphasized that the fact that the Navy was the employer was "crucial to our decision." *Id.* at 812. The court's primary concern could be the unique requirements of peacetime sea duty. *Id.*

66. See note 37 and accompanying text *supra*. The relevant language concerning homosexual status under the newly issued regulations reads as follows: "A member shall be separated under this section if . . . 2) The member has stated that he or she is a homosexual or bisexual. . . ." 46 Fed. Reg. at 9577-78 (1981). For the origin of the new regulations, see note 58 *supra*.

67. See notes 43-58 and accompanying text *supra*.

68. 632 F.2d at 808 n.20. The Ninth Circuit noted the requirement in *benShalom* that the military show that the particular plaintiff is unfit for continued employment before the government could discharge that individual, and opined that *benShalom* was a proper case to require such a showing. *Id.*

69. For the original Army language at issue, see note 24 and accompanying text *supra*. For the homosexual "status" language of the new D.O.D. regulations, see note 66 *supra*.

70. 489 F. Supp. at 970. The *benShalom* court found the services' regulations reviewable, despite the fact that "most decisions as to the composition, training, equipping, and control of the Army are beyond judicial review" and that "strong policies compel the courts to give the military the 'widest possible latitude' in the administration of personnel matters." *Id.* at 970, citing *Orloff v. Willoughby*, 345 U.S. 83 (1953); *Mindes v. Seaman*, 453 F.2d 197, 199 (5th Cir. 1971); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

However, the court consistently refused to allow the Army to hide behind the talisman of "the 'peculiar' nature of military life," requiring instead that the service provide some evidence of an actual connection of relationship between the soldier's sexual preference and the military interests to be protected. 489 F. Supp. at 972.

the disputed regulations were nonetheless unable to withstand judicial review.⁷¹ Although the court could find no property or liberty interest,⁷² the court stated that it would reinstate plaintiff if the restrictions on her first amendment rights could not be justified.⁷³ The court found that the first amendment protects soldiers as well as civilians,⁷⁴ even if the different character of the military might require a different application of those protections.⁷⁵ The court then directed courts to inquire whether military conditions *actually* dictate a different application of first amendment principles to members of the military.⁷⁶ Since the Army was unable to offer any proof to support its claim that retention of homosexuals like Ms. benShalom would be detrimental to its mission,⁷⁷ the court concluded that there was no adverse effect on any legitimate military interest.⁷⁸ Therefore, the *benShalom* court found that the need to protect the first amendment interests of the plaintiff predominated.⁷⁹

71. See notes 72-88 and accompanying text *infra*.

72. 489 F. Supp. at 971-72.

73. *Id.* at 973.

74. *Id.* at 972, citing *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). In *Perry*, the Court stated:

For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly'. Such interference with constitutional rights is impermissible. . . . We have applied the principle regardless of the public employee's contractual or other claim to a job.

408 U.S. at 597 (citations omitted).

75. 489 F. Supp. at 973. The *benShalom* court noted that "while members of the military are not excluded from the protection granted by the first amendment, the different character of the military community and of the military mission requires a different application of those protections." *Id.*, quoting *Parker v. Levy*, 417 U.S. 733, 758 (1974).

76. 489 F. Supp. at 973. See *Carlson v. Schlesinger*, 511 F.2d 1327 (D.C. Cir. 1975). In *Carlson*, the court balanced the legitimate military need against the limitation on the plaintiff's first amendment rights. *Id.* at 1331-33. The *Carlson* court noted that "[t]o strike the proper balance between legitimate military needs and individual liberties we must inquire whether 'conditions peculiar to military life' dictate affording different treatment to activity arising in the military context." *Id.* at 1331 (citations omitted).

77. 489 F. Supp. at 973.

78. *Id.* at 974.

79. *Id.* at 974-75.

The Army regulations in *benShalom* failed to pass constitutional muster on privacy grounds as well.⁸⁰ The *benShalom* court recognized that the law is unsettled as to whether private sexual conduct between consenting adults is protected by the right of privacy,⁸¹ and opined that the "peculiar nature of military life" justified giving the Army substantial leeway in exercising control over sexual conduct while soldiers are on duty and in the barracks.⁸² However, the court ruled that constitutional privacy principles clearly protected one's sexual preferences in and of themselves, and the court would not defer to the Army's attempt to control them without both a showing of actual deviant conduct and proof of a nexus between the soldier's sexual preference and her military capabilities.⁸³

Finally, the Army regulation was found to deprive Ms. *benShalom* of substantive due process under the fifth amendment.⁸⁴ Again, the court stated that for the regulation to be upheld, a nexus had to be found between the plaintiff's status as a homosexual and her suitability for service.⁸⁵ In this case, there was no such nexus—the plaintiff was discharged as "unsuitable" for service although her actual performance was not only suitable, but "exemplary."⁸⁶ Therefore, the court found that the regulation, and the Army's conduct based on it, was arbitrary and capricious.⁸⁷

It is submitted that the *benShalom* court correctly applied a rational relationship standard of review to the Army's dismissal of Ms. *benShalom*. The rational relationship test requires only that the means selected in the regulation rationally advance a legitimate government end. However, the constitution is violated if there exists no relationship. In *benShalom* the Army regulations failed to pass constitutional muster, not because they were subjected to a high level of judicial scrutiny, but rather, because the Army was unable to meet the

80. *Id.* at 975. The *benShalom* court found that the right of "personal privacy" meant nothing if it did not "encompass an individual's right to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as one's personality, self-image, and indeed, one's very identity." *Id.*

81. *Id.* at 976. The court reached the conclusion that the law was unsettled after comparing *Doe v. Commonwealth's Attorney*, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd* 425 U.S. 901 (1976), with the subsequent statements of Justice Brennan in *Carey v. Population Services Int'l*, 431 U.S. 678, 688 n.5, & 694 n.17 (1977). 489 F. Supp. at 976. See note 47 *supra*.

82. 489 F. Supp. at 976.

83. *Id.* The Army did not even attempt to show that such a nexus existed. *Id.*

84. *Id.*

85. *Id.* at 977. See note 83 and accompanying text *supra*.

86. 489 F. Supp. at 977.

87. *Id.*

extremely light burden of showing a rational relationship between its admittedly legitimate goals and the methods it chose to reach them.⁸⁸

The *benShalom* court's two-step "nexus test" provides the military services with useful guidance as to when it is permissible to regulate a servicemember's sexual preference,⁸⁹ a standard fairly simple to apply and review. Where the service can demonstrate that sexual preference has an adverse effect on military capabilities or performance, it is clear that the court will defer to the services' regulation.⁹⁰ Where no such adverse effect can be demonstrated, it is submitted that there is no justifiable reason for discharging servicemembers solely on the basis of sexual preference. Therefore, it appears that the *benShalom* approach strikes a fair balance, protecting the military services against adverse impact upon military effectiveness and efficiency, while ensuring sufficient protection for individual rights.

It is concluded, however, that widespread adoption of the *benShalom* analysis might have some adverse impacts on the military. It appears obvious that to survive meaningful review, the services will have to develop more extensive factual records in their sexual preference discharge cases in order to justify a discharge. It cannot be questioned that this would restrict somewhat the services' flexibility in retaining or discharging personnel, but it may be questioned whether the services have an interest in discharging competent personnel without justification. On the whole, it appears that the effect on the individual is so severe, and the burden on the military so insignificant, that meaningful review of the services' discharge actions is justified.⁹¹

B. Discharge for Homosexual Acts

On the question of discharge for homosexual acts, the guidance provided by the three cases discussed in part II is not uniform. The *benShalom* case offers some support for the view that discharge of a servicemember for homosexual acts may be an unconstitutional violation of privacy and first amendment rights.⁹² The *benShalom* court held that the first amendment protects the manifestations of one's personality,⁹³ and unless the manifestation occurs on duty or in the barracks,

88. *Id.* at 976. See note 83 and accompanying text *supra*.

89. It is submitted that such guidance would be equally useful whether homosexual status or homosexual acts are at issue. For a discussion of this point, see notes 97-101 and accompanying text *infra*.

90. 489 F. Supp. at 976. It is clear, for example, that the *benShalom* court would defer to service regulations which control sexual conduct while the servicemember is on duty or in the barracks. *Id.*

91. The *benShalom* court found it necessary to weigh similar factors and arrived at the same conclusion. See *id.* at 971.

92. See notes 73-83 and accompanying text *supra*.

93. 489 F. Supp. at 976. "The Ninth Amendment protects the privacy of one's personality, while the First Amendment protects manifestations of that personality." *Id.* See also notes 73-79 and accompanying text *supra*.

the Army must show, in addition to the actual "deviant" conduct, a nexus between a soldier's sexual preference and his military capability.⁹⁴ Even though the *benShalom* court was specifically concerned with homosexual status, nothing in the phrasing of this "nexus test," or in the court's analysis, suggests that the test is only applicable to regulations concerning homosexual status. On the contrary, the *benShalom* court's phrasing of the "nexus test" in terms of conduct rather than status,⁹⁵ and its citation of sexual conduct in the barracks or on duty as examples of appropriate regulation of sexual preference, suggest that the "nexus test" is the proper test to evaluate service attempts to regulate homosexual acts as well as homosexual status.⁹⁶ Thus, in any case where the service cannot show that the homosexual acts of the servicemember result in some demonstrable harm to the service, that homosexual servicemember cannot be discharged.

However, the Ninth Circuit in *Beller* arrived at the opposite result after applying a different analysis.⁹⁷ The court defined the issue before it to *not* involve government regulation of private consensual homosexual behavior.⁹⁸ The court stated that it must merely assess a military regulation which prohibits personnel from engaging in homosexual conduct while they are in the service.⁹⁹ Since the plaintiff did not make a claim of deprivation of his right to equal protection of the laws, the court concluded that it need not address the question of whether con-

94. 489 F. Supp. at 976. For a discussion of the *benShalom* "nexus test," see notes 80-87 and accompanying text *supra*.

95. 489 F. Supp. at 976.

96. *Id.*

97. For a discussion of the factual background of the *Beller* case, see notes 59-65 and accompanying text *supra*. Like the *benShalom* court, the Ninth Circuit concluded that the plaintiff had no valid property or liberty interest upon which to base a claim of deprivation of procedural due process. 632 F.2d at 805-07. For the *benShalom* court's treatment of this issue, see 489 F. Supp. at 971-72. The Ninth Circuit, in considering plaintiff's property interests, said that "unless the Navy as a substantive matter may not discharge all homosexuals, or unless it must consider factors in addition to homosexuality in its decision . . . we see no basis for inferring any expectation of continued service sufficient to constitute a . . . property interest." 632 F.2d at 805. The Ninth Circuit also failed to find a liberty interest, since "the fact of an honorable discharge on its face seems to impose no stigma on the recipient." *Id.*

98. 632 F.2d at 810. The court found that "*Roe* . . . and . . . *Zablocki* . . . suggest that some kinds of government regulation of private consensual homosexual behavior may face substantial constitutional challenge," requiring the court to decide "whether there is a right to engage in this conduct in at least some circumstances," but the court concluded that the Navy regulation prohibiting private consensual homosexual behavior was not one of them. *Id.* The court did not suggest what kinds of government regulations would require it to decide the substantive constitutional issue. *Id.*

99. *Id.*

sensual private homosexual conduct is a fundamental right, the regulation of which would require heightened judicial scrutiny.¹⁰⁰

In its substantive due process analysis, the *Beller* court utilized a rational relationship standard of review.¹⁰¹ The court held that the nature of military employment was crucial to its decision, stating that, although one does not surrender one's constitutional rights upon entering the military, those rights must be viewed in the light of the special circumstances of the Navy.¹⁰² The court concluded that, since the Navy had "multiple grounds" for believing the regulations appropriate for the full and efficient accomplishment of its mission,¹⁰³ and since the Navy's concerns have a basis in fact and are not conjectural, there was reason to sustain the regulation in this case.¹⁰⁴

The *Beller* case was decided on extremely narrow grounds.¹⁰⁵ It is submitted that the court went to great lengths to distinguish "military regulations which prohibit personnel from engaging in homosexual conduct" from "government regulation of private consensual homosexual behavior."¹⁰⁶ The court also refused to decide any issues other than the substantive due process issue.¹⁰⁷ Thus, the court was able to avoid the issue of whether there were in fact any "conditions

100. *Id.* at 807.

101. *Id.* at 809-10. Even though the court began its analysis of the case by placing it "somewhere between [the rational relationship and compelling state interest] standards," after balancing the competing interests and finding the government's more weighty, it nonetheless concluded that the rational relationship standard was the correct standard with which to review the case. *Id.* at 808-10.

102. *Id.* See note 64 and accompanying text *supra*.

103. 632 F.2d at 811. The court found four grounds supporting the regulations: 1) preservation of the fabric of military life; 2) preservation of the integrity of the recruiting process; 3) maintenance of discipline, and 4) acceptance of the men and women of the military stationed in foreign countries. *Id.*

104. *Id.* at 811-12.

105. See notes 98-100 and accompanying text *supra*.

106. See note 98 *supra*.

107. See 632 F.2d at 807.

108. It is submitted that, by avoiding first amendment issues, the court was able to cite the "rights restrictive" portion of *Parker v. Levy*, 417 U.S. 733 (1974) (constitutional rights for those in the military must be restricted by the special circumstances of the armed forces; the military is, "by necessity, a specialized society separate from civilian society") while ignoring the portion of *Parker* which requires the military to justify any limitation placed upon the servicemember's constitutional protections (*i.e.*, that the court must inquire whether there are in any particular case, conditions peculiar to military life which truly require restricting the rights of those in the military). 632 F.2d at 810-11. For a further discussion of the use of "rights restrictive" language in Supreme Court opinions, see notes 74-76 and accompanying text *supra*. By this analysis, the Ninth Circuit was able to avoid subjecting the

peculiar to military life" that actually required different treatment of homosexual activity arising in the military context.¹⁰⁸

It is also submitted that the court avoided the important issue of whether the means chosen to regulate homosexual behavior were overbroad.¹⁰⁹ Since the regulation was reviewed under a rational relationship standard, the court did not have to concern itself with the "wisdom of the regulation."¹¹⁰ It is submitted that the very narrowness of the Ninth Circuit approach reduces the importance of its contribution to this area of law since, should a plaintiff make anything other than a substantive due process attack on discriminatory regulations, the *Beller* decision would provide little, or no guidance.¹¹¹

The *Matlovich* case injects yet another factor into the consideration¹¹² primarily because it too failed to resolve the constitutional question of whether private consensual homosexual activities between adults are protected by the Constitution.¹¹³ The case holds that where a regulation expressly contemplates exceptions to a general policy of discharging homosexuals, any discharge under the regulation is im-

Navy's regulations to any meaningful review under which, presumably, they would fail. The Ninth Circuit did not explain why it felt the fifth amendment protections were not entitled to the same level of scrutiny as first amendment protections. See 632 F.2d at 807-12.

109. See 632 F.2d at 812. The district court, in its 1977 opinion, had detailed why the Navy regulation was overbroad:

[T]he particulars specified could in this case be grounds for excluding other persons as well. Thus, "tensions and hostilities" could justify exclusion of members of minorities or other persons who also may be "despised" by some; disruptive emotional relationships could exist between male and female Navy personnel justifying exclusion of women; parents may become concerned over their children associating with Navy personnel who may gamble, use alcohol or drugs or engage in illicit heterosexual relations; Persons other than homosexuals may engage in disruptive physical aggression, and fear of criminal prosecution, social stigma and divorce and the danger of undue influence is a risk created by any form of illegal or antisocial conduct, not confined to homosexuality.

In other words, the problems which the Navy enumerates to support blanket exclusion of persons who engage in homosexual acts are problems which are endemic to a heterogeneous society such as the Navy and with which it deals in the ordinary course of its operations on a case by case basis.

Saal v. Middendorf, 427 F. Supp. 192, 201 (N.D. Cal. 1977), *rev'd sub nom. Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980).

110. See 632 F.2d at 812.

111. See note 103 and accompanying text *supra*.

112. For the factual background of the *Matlovich* case, see notes 43-46 and accompanying text *supra*.

113. 591 F.2d at 855. See notes 52-56 and accompanying text *supra*.

proper¹¹⁴ unless the service can give a reasonable explanation for its failure to make an exception in that particular case.¹¹⁵

The controlling principle, according to the Court of Appeals for the District of Columbia Circuit, is that a service branch must give sufficient indications of the criteria used in the exercise or non-exercise of its discretion.¹¹⁶ This, the court noted, would enable the reviewing court to appraise the decision under the appropriate standard of review.¹¹⁷ When, on remand, the Air Force after two attempts was unable to clarify the standards used in the application of its discretion, the district court entered judgment in favor of Sergeant Matlovich.¹¹⁸

Assessing the impact of the *Matlovich* cases on the law of discharge for homosexual acts is difficult. Soon after the decision adverse to the military in the *Matlovich* case, the Department of Defense, in an attempt to remove the discretion issue from judicial review,¹¹⁹ ordered the services to change their regulations. As a result of this action, the *Matlovich* decision is unlikely to have a direct impact on future cases. However, the *Matlovich* court's requirement that the Air Force show specific, non-arbitrary reasons for not retaining Matlovich, seems to be merely another way of stating that the service must show a nexus between sexual preference and military performance in order to justify a discharge for homosexual acts.¹²⁰ This, of course, would be the same

114. 23 F.E.P. Cases at 1252. "Absent standards which can be evenly, fairly and objectively sustained and applied throughout the Air Force . . . the discharge of Matlovich was improper." *Id.*

115. 591 F.2d at 855-57. The service in this case is free to formulate standards by either rule-making or case-by-case decisionmaking. *Id.* at 861.

116. *Id.* at 859-61.

117. *Id.* at 860. Adopting the analysis propounded in the *Laird* case, the court pointed out that: 1) where the executive reviewing authority could find in favor of a claimant, but fails to do so, reasons supported by facts in the record must be given; 2) the reviewing court must consider only the reasons given by the executive authority, and not rummage in the record to find some reason to sustain his determination, and 3) the regulatory requirement for reasons is meaningful, and is one that cannot be satisfied by a mere recitation of the statutory provisions. *Id.*, citing *United States v. Laird*, 469 F.2d 773, 779-83, 787 (2d Cir. 1980).

118. 23 F.E.P. Cases at 1252. However, the Ninth Circuit in *Beller* found that the discretion exercised by the Secretary of the Navy in retaining a sailor who would otherwise be discharged for homosexuality, to be less important. See 632 F.2d at 802-05. Since the type of discretion involved was inherent in the Secretary's authority and "unrelated to the fitness . . . of the particular individual or the reasons why the Navy discharges homosexuals," rather than being a specific discretionary provision set forth in the regulations as in *Matlovich*, the Ninth Circuit did not consider the Secretary's discretion to be an important factor in the resolution of the case. *Id.* at 805.

119. 46 Fed. Reg. at 9571 (1981). For a more detailed treatment of the D.O.D. response to the *Matlovich* decision, see notes 58 & 66 *supra*.

120. For a discussion of the Court of Appeals for the District of Columbia's requirement that the Air Force show specific non-arbitrary reasons for not retaining Sergeant Matlovich, see notes 112-18 and accompanying text *supra*.

"nexus test" which *benShalom* requires.¹²¹ While neither *Matlovich* nor *benShalom* are anything more than persuasive authority outside their respective jurisdictions, it is submitted that their approach is preferable to the semantic fine tuning engaged in by the *Beller* court.¹²² Therefore, it is submitted that their analysis is the one that should be followed in most instances, with the result that the law would require proof of a nexus between homosexuality and military efficiency before a service-member can be discharged for homosexual behavior or status.

However, the *Beller* case indicates how fact sensitive a review of a discharge for homosexual acts can, and perhaps must, be.¹²³ It is, of course, possible that a *benShalom*-type challenge to the Navy regulations could succeed, but the outcome is uncertain since the *Beller* court specifically avoided consideration of discharge for homosexual status.¹²⁴ On the other hand, it is also possible that some reviewing courts could find, as the Ninth Circuit did, that the particular service's situation was factually distinguishable from the usual discharge case so that no "nexus test" or meaningful review of the service's regulations should be required.¹²⁵ It is also possible that the service regulations might survive a *benShalom* analysis if, under the facts of the particular case, the service could show the required nexus between the member's sexual preference and military performance and/or efficiency.

Hence, under the present state of the law, servicemembers will continue to be discharged for homosexual acts because this continues to be the Department of Defense policy.¹²⁶ Whether or not these discharges will be upheld very likely will depend on the analysis which the court applies and the facts of each individual case, including perhaps the branch of the service to which the plaintiff belongs.¹²⁷

IV. CONCLUSION

The cases discussed, although undoubtedly significant, have left the law in a perplexing state of uncertainty. Under the present state of the

121. For an analysis of the *benShalom* "nexus test," see notes 80-81 and accompanying text *supra*.

122. For an analysis of the *Beller* court's approach, see notes 105-11 and accompanying text *supra*.

123. The Ninth Circuit stressed the importance of the fact that the employer was in this case the Navy. 632 F.2d at 810. For a discussion of the importance of this fact in the court's analysis, see note 65 and accompanying text *supra*.

124. The Ninth Circuit seemed to base its decision on extremely narrow grounds. See the discussion at notes 105-11 and accompanying text *supra*.

125. One possible basis for such a factual distinction between services could be that the Navy requires extended tours of peacetime sea duty. 632 F.2d at 811. See note 65 *supra*. See also the discussion of the *Beller* court's reasoning at notes 105-11 and accompanying text *supra*.

126. 46 Fed. Reg. at 9571 (1981).

127. This factor seemed to be vitally important to the *Beller* court. See 632 F.2d at 810 & note 65 and accompanying text *supra*.

law, despite service regulations to the contrary, it appears that no service can legally discharge an individual merely for being a homosexual,¹²⁸ or even for engaging in homosexual activity, without showing a nexus between his sexual preference and his lack of military capabilities.¹²⁹ On the other hand, specific, compelling factual situations may induce a court to avoid meaningful review of a discharge based on sexual preference, or even enable such a discharge to survive meaningful review.¹³⁰

This contradictory state of the law has arisen primarily because none of the cases have resolved, or even reached, the issue of whether private consensual homosexual activity between adults is protected by the Constitution.¹³¹ Should the Supreme Court decide that such activity is constitutionally protected, the law in this area would be greatly simplified since it is extremely doubtful whether the discriminatory regulations of *any* service could survive a level of review requiring demonstration of a "compelling state interest."¹³² But given the Supreme Court's uncertainty concerning sexual preference discrimination, an authoritative pronouncement by the Court does not seem likely in the foreseeable future.¹³³

It is conceded that the armed services' discriminatory policies are intended to solve or avoid genuine problems in the military.¹³⁴ It is suggested, however, that the current regulations are incapable of providing a solution, because the problems that the services are trying to reach are not problems caused solely by homosexuals.¹³⁵ Rather, the problems of decreased military efficiency and morale caused by disruptive and anti-social sexual behavior exist regardless of whether they are caused by heterosexual, homosexual, or bisexual servicemembers.¹³⁶

128. Discharge for homosexual status is discussed at notes 66-91 and accompanying text *supra*.

129. The impact of the cases on the law of discharge for homosexual acts is discussed at notes 92-127 and accompanying text *supra*.

130. See notes 123-27 and accompanying text *supra*.

131. Typical of the approaches of the cases so far decided, is the treatment of the constitutional issues by the District of Columbia Circuit. See 591 F.2d at 855.

132. None of the services, despite many opportunities, and some attempts, have been able to show that a nexus exists between sexual preference and military capabilities. The Army did not even try to show that such a nexus existed. See note 68 *supra*. The Air Force failed in two attempts to show such a nexus. See 23 F.E.P. Cases at 1252. The Navy, when provided with a similar opportunity, "was either unable or unwilling to do so." 632 F.2d at 804 & n.13.

133. It is submitted that the Supreme Court seems to be unable or unwilling to definitively rule on the issue. See note 53 *supra*.

134. The *Beller* court noted that the Navy's "concerns have a basis in fact and are not conjectural." 632 F.2d at 811.

135. See the district court's analysis in *Saal*, at note 109 *supra*.

136. *Id.*

It is submitted that the proper way to eliminate disruptive behavior in the military is, as Judge Gesell suggested in *Matlovich*,¹³⁷ through carefully tailored regulations specifically directed in a non-discriminatory fashion at the harmful behavior.¹³⁸ The legitimate needs of the armed services and the rights of servicemembers with non-standard sexual preferences could best be balanced by the replacement of all regulations which discriminate on the basis of sexual preference with new regulations and a new policy patterned after the Civil Service Commission's 1975 suitability guidelines.¹³⁹ The services have already responded to some problems caused by disruptive sexual behavior, such as sexual harassment in the workplace, in just such a non-discriminatory fashion.¹⁴⁰

It is further suggested that the services incorporate the *benShalom* "nexus test" into their new regulations.¹⁴¹ By ensuring that no service-

137. At the conclusion of the first *Matlovich* case in 1976, Judge Gesell addressed the following statement to the Air Force:

This is a distressing case. It is a bad case. It may be that bad cases make bad law. Having spent many months dealing with aspects of this litigation, it is impossible to escape the feeling that the time has arrived or may be imminent when branches of the Armed Forces need to reappraise the problem which homosexuality unquestionably presents in the military context.

The Services are admittedly involved in matters of immediate and clear importance. They not only have problems with respect to performing the obvious military task but there are moral, religious and privacy overtones that cannot and should not be overlooked.

We all recognize that by a gradual process there has come to be a much greater understanding of many aspects of homosexuality. Public attitudes are clearly changing. Some state legislatures have already acted to reflect these changing public attitudes moving more in the direction of tolerance. Physicians, church leaders, educators and psychologists are now able to demonstrate that there is no standard, no preconceived stereotype of a homosexual which unfortunately, some of the Air Force knee-jerk reaction to these cases would suggest still prevails in the Department.

The Armed Forces have been in many ways leaders in social experimentation and in their adaptability to changing community standards Here another opportunity is presented. While the Court has reached its conclusions, as a judge must do, on the law, I hope it will be recognized that after months of intense study of the problem, matters within and without the record, the Court individually, for what it is worth, has reached the conclusion that it is desirable for the military to reexamine the homosexual problem to approach it in perhaps a more sensitive and precise way.

13 E.P.D. ¶ 11,325 (D.D.C. 1976).

138. *Id.*

139. Fed. Personnel Manual Supp. 731-1, subch. 53-2(3)c. See note 13 *supra*.

140. See A.F.R. 30-2, ch. 5 (1981); Interim Message Change (I.M.C.) 81-2, para. 1L (8 Oct. 1981).

141. For a description of the *benShalom* "nexus test," see notes 80-83 & 92-96 and accompanying text *supra*.

member is discharged unless the alleged sexually disruptive behavior actually had an adverse effect on military efficiency or job performance, the service would protect both the individual's rights, and itself against the loss of valuable personnel.¹⁴² Incorporation of this standard into the new regulations would also provide the services with the knowledge that their discharges would survive judicial review in most instances.¹⁴³

It is submitted that incorporating the suggestions outlined in this comment would allow the services to promulgate effective new regulations which would ensure the discipline and order essential to an effective military, while also protecting individual liberty.¹⁴⁴

*Lawrence R. Deiter **

142. Incorporation of this requirement into the new regulations should present the services with little difficulty, since they already use a similar requirement in other administrative discharge actions. For example, in discharging an airman for a personality disorder under A.F.R. 39-12 (the same regulation under which discharges for homosexuality are presently brought), the Air Force must demonstrate to a board of officers 1) that it is a disorder diagnosed by medical personnel, and 2) that it interferes with the member's ability to adequately perform his duties. A.F.R. 39-12, §A, ¶ 2-4 (1972). There seems to be little reason to expect that the nexus test would be any more difficult to apply in cases of discharge for disruptive sexual behavior than in cases of discharge for personality disorder.

143. Since the *benShalom* nexus test represents the most stringent standard yet applied by courts reviewing military discharges based on sexual preference, it would seem reasonable that service attempts to ensure that the nexus is present before discharging a member would greatly enhance the chances of the discharge being upheld upon review.

144. *benShalom v. Secretary of Army*, 489 F. Supp. at 974, citing *Broadrick v. Oklahoma*, 413 U.S. 601, 611-12 (1973).

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